

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION – SIOUX CITY

PEG BOUAPHAKEO et al., individually)	No. 5:07-cv-04009 JAJ
and on Behalf Of Themselves and All)	
Other Similarly Situated Individuals,)	
)	
Plaintiffs,)	
)	
v.)	
)	JOINT APPLICATION FOR RULE 104(a)
TYSON FOODS, INC.)	DETERMINATION OF PRELIMINARY
)	QUESTIONS ON ADMISSIBILITY OF
Defendant.)	EVIDENCE

COME NOW the parties hereto, pursuant to Federal Rule of Evidence 104(a), and jointly request the Court determine the admissibility of the following evidence, prior to trial, and in support thereof state:

1. At the Final Pretrial Conference in this case conducted on October 21, 2010, the parties jointly agreed, despite continuance of the trial date in this case from November 1, 2010, until September 7, 2011, that an early determination by the Court as to the admissibility of certain categories of evidence that are presently the subject of pending Motions in Limine, not yet heard or decided, would assist in narrowing the issues for trial. The parties therefore jointly agreed to apply to this Court for Rule 104(a) rulings on questions of admissibility of certain evidence as set forth below, and to request a hearing on such matters.

2. While the parties are willing to hold arguments on all issues in the pending Motions in Limine, the specific issues of admissibility which the parties jointly agree should be heard and decided in connection with this application are:

- (1) Any evidence or argument by Defendant on issues of compensability, *de minimis*, willfulness and good faith. (Doc. 154, Plaintiffs' Motion *in Limine* to Preclude Evidence or Argument on Issues of Compensability, De Minimis, Willfulness and Good Faith.)
- (2) Any references to or evidence of "industry practice" in support of Defendants' *de minimis* defense or any other defense. (Doc. 150, Plaintiffs' Omnibus Motions *in Limine*, item 5.)
- (3) Any references to or evidence that Defendants pay overtime pay for hours they deem to be work (Doc. 150, Plaintiffs' Omnibus Motions *in Limine*, item 7.)
- (4) Any references to Tyson as "IBP" or any imputations of past conduct or policies of "IBP" (Defendant's Motion in Limine ¶ 1);
- (5) Evidence relating to any other FLSA actions, verdicts, settlements, offers of judgment or consent decrees involving Defendant (Defendant's Motion in Limine ¶2);
- (6) Evidence relating to changes in Defendant's policies and practices outside of what Defendant alleges is the relevant time (Defendant's Rule 407 Motion in Limine ¶¶1 and 2);
- (7) Any reference to Defendant's withdrawal of certain defenses including "good faith" or willfulness (Defendant's Motion in Limine ¶9);

3. At the time of the Final Pretrial Conference, at the joint request of the parties, the Magistrate Judge obtained a date for hearing by this Court on these questions of admissibility.

These issues are set for hearing on December 2, 2010, commencing at 9:00 a.m. in Davenport, Iowa¹. The parties also request that the Court hear arguments on the pending Motions for Summary Judgment (Doc. 123 and Doc. 124).

4. The determination by the Court of these preliminary questions of admissibility will narrow and more clearly define the issues for trial, will assist the parties in determining the extent and need for any additional discovery, will assist in more precisely estimating the time necessary for trial of this case, and in all respects will serve the interests of justice. See F.R.E. 104(c) (hearings on preliminary matters “shall be so conducted when the interest of justice requires...”).

WHEREFORE, the parties jointly request the Court proceed with hearing on December 2, 2010, and determine the preliminary questions of admissibility of evidence defined above, and for such other relief as the Court shall deem appropriate in the premises.

/s/ Candis A. McGowan
Candis A. McGowan
Robert L. Wiggins
WIGGINS, CHILDS, QUINN & PANTAZIS
301 19th Street North
Birmingham, AL 35203
Telephone: (205) 314-0500
Facsimile: (205) 254-1500
E-Mail: cmcgowan@wcqp.com
rwiggins@wcqp.com
ATTORNEYS FOR PLAINTIFFS

/s/ Richard J. Sapp AT0006915
NYEMASTER, GOODE, WEST,
HANSELL & O'BRIEN, P.C.
700 Walnut Street, Suite 1600
Des Moines, IA 50309-3899
Telephone: (515) 283-3144
Facsimile: (515) 283-8045
E-Mail: rjs@nyemaster.com
ATTORNEY FOR DEFENDANT
TYSON FOODS, INC.

¹ The parties understand that while the above issues are those identified by the parties as having priority, that other paragraphs of the pending motions in limine and issues involved in the pending motions for partial summary judgment, may also be heard on December 2, 2010, time permitting.